No. 86 1872

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

CLAUDE HORACE HARGRAVE - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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Counsel for Petitioner

Petition for Writ of Certiorari Filed: _____

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED FOR REVIEW

Is it a denial of a Defendant's Fifth and Sixth Amendment rights to deny the disclosure of a confidential informant on the grounds of immateriality in a case involving possession of drugs with intent to sell when the possession is constructive and involves premises in which the Defendant did not have exclusive control, was not present when the confidential informant was present on the premises and observed the drugs and those who were present.

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This Writ Should Be Granted for Three Separate Reasons. First, the Supreme Court of Kentucky Refused to Follow the Law and Test for Determining when a Confidential Informant Must Be Produced as Set Forth in *Roviaro* v. *United States,* 353 U.S. 53, 77 S.Ct. 623, 1 L. Ed. 639 (1957). Second, the Issue of When the Confidential Informant Must Be Produced is an Issue That Arises in Our Courts Daily and There is a Wide Disparity Among the State Courts as Well as the Various Circuits as to When Disclosure Should Be Ordered. This Court Should Grant This Writ and Set a More Fixed Rule on When Disclosure Is Required. Third, There are Numerous Decisions, Both State and Federal in Conflict Over Whether or Not Non-Exclusive Possession of the Premises Where Drugs are Found Will Support a Conviction. Thus, this Important Federal Question Should Also Be Settled by This Court.	6–10
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

CLAUDE HORACE HARGRAVE - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner, CLAUDE HORACE HARGRAVE, respectfully prays that a Writ of Certiorari issue to review the opinion of the Supreme Court of Kentucky entered on November 26, 1986.

OPINION BELOW

The opinion of the Supreme Court of Kentucky was rendered on November 26, 1986. Ky. 724 S. W. 2d 202 (1987) Petition for Rehearing was denied March 12, 1987.

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered November 26, 1986. Petition for Rehearing was denied on March 12, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution, which states in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution, which states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . .

The Fourteenth Amendment to the United States Constitution, which states in pertinent part:

> . . . nor shall any state deprive any person of life, liberty or property without due process of law . . .

STATEMENT OF THE CASE

At approximately 11:00 a.m. on July 11, 1984, a Louisville Division of Police narcotics detective received information from a confidential informant regarding the Petitioner and the premises located at 4306 South Third Street, Louisville, Kentucky. Following receipt of this information, the detective placed the premises under surveillance but did not see the Petitioner or an illegal activity.

At approximately 6:00 p.m. on July 11, 1984, the detective signed an Affidavit in Support of Petition for

Search Warrant. (TR, p. 25). The Affidavit stated in part that the informant told the detective that "within the past 48 hours, he was at 4306 South Third Street, the home of CLAUDE HARGRAVE, and at that time and at that same address, he observed a quantity of marijuana." Upon execution of this Affidavit, a search warrant was issued for the premises (TR, p. 26).

Following the issuance of the search warrant, Louisville narcotics officers placed the premises under surveillance and waited for the Petitioner. Shortly after midnight, the detectives still had not seen the Petitioner and decided to execute the search warrant. (TE, 2/5/86/II, p. 47). Upon execution of the search warrant, the officers found no one at the residence (TE, 2/5/86/I, p. 27), but found a quantity of cocaine, marijuana, methaqualone, and methamphetamine. Police officers maintained possession of the premises throughout the day following the execution of the search warrant and the Petitioner never appeared.

The Petitioner's brother came to the premises the afternoon of July 12, 1984 and was told to contact the Petitioner and have him call the narcotics officers.

The Petitioner later contacted the narcotics officers and surrendered to them on July 20, 1984 where he was placed under arrest. (TR, p. 20).

The Petitioner was indicted by the Jefferson County Grand Jury on November 17, 1984 for trafficking in a controlled substance—cocaine, trafficking in a controlled substance—marijuana, trafficking in a con-

trolled substance—methaqualone, trafficking in a controlled substance—methamphetamine, and persistent felony offender—1st degree. (TR, pp. 1-4).

On March 26, 1985, the Petitioner made a motion to produce the informant and request for hearing. A hearing was scheduled for April 17, 1985. Most of the hearing consisted of arguments of counsel relating to the importance of the confidential informant and the controlling law. (TE, 4/17/85, pp. 2-47). These arguments are important in that they show the Petitioner was charged simply because it was his house, (TE, 4/17/85, p. 6) and that the Court misunderstood the test to be applied regarding the production of a confidential informant. During the course of the hearing, the Petitioner moved that the confidential informant be produced for an encamera hearing. (TE, 4/17/85, p. 32). The Court refused because he had not had good luck with them. (TE, 4/17/86, p. 33).

At the hearing, the Petitioner produced two witnesses who offered evidence that the Petitioner was not at home for at least one week prior to the execution of the search warrant. (TE, 4/17/85, pp. 50, 60).

The trial court overruled the Petitioner's Motion to produce the confidential informant, holding that denying disclosure did not adversely affect the Petitioner because he had other witnesses to bolster his defense that the controlled substances did not in fact belong to him and the public interest in non-disclosure outweighed any benefit to Petitioner. (TR, p. 206).

The trial commenced on February 5, 1986 and the evidence was concluded on February 7, 1986 without benefit of testimony of the confidential informant. The Commonwealth's evidence presented showed that upon execution of the search warrant, the police officers found drugs in the house. The Defendant offered evidence revealing that the Petitioner's home was accessible to many other individuals, both family and friends, and that the Petitioner's control over the residence was non-exclusive. (TE, 2/6/86/III, p. 37). A vast amount of evidence was also introduced revealing that the Petitioner was not at his residence for approximately one week prior to the execution of the search warrant.

After deliberations, the jury found the Petitioner guilty of both trafficking (possession with intent to sell) and possession of cocaine found on the premises on July 12, 1984 and several misdemeanor possession counts, fixed his punishment at seven (7) years in prison, which was enhanced to a twenty-year sentence under Kentucky's persistent felony offender statute.

The Supreme Court of Kentucky affirmed Petitioner's conviction. In affirming, the Supreme Court held that the informant's testimony would have been immaterial in that said testimony would relate only to whether Petitioner was present when the informant witnessed the drugs. The Supreme Court of Kentucky in its opinion also held that constructive possession may be inferred from non-exclusive control of the premises.

REASON FOR GRANTING THE WRIT

This writ should be granted for three separate reasons. First, the Supreme Court of Kentucky refused to follow the law and test for determining when a confidential informant must be produced as set forth in *Roviaro* v. *United States,* 353 U. S. 53, 77 S. Ct. 623, 1 L. Ed. 639 (1957). Second, the issue of when the confidential informant must be produced is an issue that arises in our courts daily and there is a wide disparity among the state courts as well as the various Circuits as to when disclosure should be ordered. This Court should grant this writ and set a more fixed rule on when disclosure is required. Third, there are numerous decisions, both state and federal in conflict over whether non-exclusive possession of a premises where drugs are found will support a conviction. Thus, this important federal question should also be settled by this Court.

The Supreme Court of Kentucky, in its decision in this case, upheld the trial Court's refusal to order disclosure of the confidential informant under *Rovario* v. *United States,* 353 U. S. 53, 77 S. Ct. 623, 1 L. Ed. 639 (1957). Petitioner argued at the trial level that the informant was a material witness and could render critical testimony to bolster his defense that he did not possess the drugs and was not present when the informant saw the drugs at Petitioner's residence. Further, Petitioner asserted the informant, if produced, could testify as to the exact time the informant was present, who else was present, how access was

gained and who, if any of the individuals present, had the drugs in their possession.

Without question under the facts of this case, disclosure of the informant would have been "highly relevant and might have been helpful to the defense." 353 U.S. at 63-64, 77 S. Ct. at 647. The fact that Petitioner was faced with the burden of explaining or justifying his alleged constructive possession of the drugs "emphasizes his vital need for assess to *any* material witness." 353 U. S. at 63, 77 S. Ct. at 646-647 (emphasis added).

The Kentucky Supreme Court ignored factors to be considered as outlined in *Roviaro.* The Court failed to consider that the crime charged in this case was possession of drugs with intent to sell. Just as the informant witnessed the sale in *Roviaro,* the informant in this case witnessed the possession. The fact that the informant witnessed this possession on July 11, 1984 and the officers did not execute the warrant until after midnight on July 12, 1984 is insignificant. The fact that the informant witnessed the possession in this case is just as important as witnessing an actcal sale as in *Roviaro.*

The Kentucky Supreme Court also failed to consider the possible defenses. Since the drugs were found at the Petitioner's place of residence, it appeared that the only possible defense was that he did not possess them and that they must belong to another individual. Again, this defense stresses the importance of the testimony of the informant. The Court

failed to consider this significance, simply holding that is was immaterial.

Since the informant is the only known individual present on the premises at the time the drugs were present, the informant is the most important witness in the case. As to relevant factors, there are none in dispute of which the informant is not an important part.

On page three of its written decision in this case, the Kentucky Supreme Court stated:

> "The fact that MR. HARGRAVE 'was not present when the informant witnessed the possession of the drugs' clearly is *im*material; possession was inferred from the drugs being present on Appellant's premises. . . .".

The Supreme Court of Kentucky determined that the informant's testimony would have been immaterial because constructive possession could be inferred simply from the drugs being on Petitioner's property notwithstanding his non-exclusive control over the property. Herein lies a direct conflict of authority.

There are numerous state decisions holding that it is not necessary to prove a defendant had exclusive possession of premises where drugs are found and, on the other hand, about an equal number of state decisions, including Kentucky, hold to the contrary, i.e., constructive possession cannot be inferred from non-exclusive possession of the premises. Many conflicting cases are cited in a general annotation on this important issue of law in 56 ALR 3d 948, 956-958, and

its supplemental pocket part, entitled "Elicit Drugs—Non-Exclusive Possession."

The Federal Courts of Appeals are likewise in disagreement over whether or not non-exclusive possession of premises will support a conviction. *United States* v. *Swiderski,* 548 F. 2d 445 (2d Cir., 1977) (joint possession is alone not enough to provide basis for conviction); *United States* v. *Morgan,* 581 F. 2d 933 (D.C. Cir., 1978) (must prove that defendant knew about the presence and intended to exercise dominion and control over the drugs); *United States* v. *Kincade,* 714 F. 2d 1064 (11th Cir., 1983) (constructive possession need not be exclusive but may be shared with others); *United States* v. *Massey,* 687 F. 2d 1348 (10th Cir., 1982) (constructive possession may be joined among several persons); *United States* v. *Riggins,* 687 F. 2d 1264 (5th Cir., 1977) (constructive possession may be joined among several individuals).

In view of the clear showing that the Supreme Court of Kentucky decided a federal question in this case in a way in conflict with the decisions of other state courts (even its own) and of federal courts of appeals and particularly in view of the legion of conflicting authorities, this Court should grant this petition in order to settle the controversy.

A defendant's right to due process of law and the factors set forth in *Roviaro* are based on fundamental fairness. *United States* v. *Valenzuela-Bernal,* 458 U. S. 858, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982). The Kentucky trial Court and the Supreme Court of Ken-

tucky denied this Petitioner his Fifth and Sixth Amendment rights to fundamental fairness when they denied him access to the most important witness in his case under the guide that the witness' testimony was immaterial. In denying to disclose the identity of this witness, the Kentucky Courts ignored the "some plausible showing" test set forth in *United States* v. *Valenzuela-Bernal, supra.*

Petitioner submits that because the trial Court refused his timely request to produce the informant for trial, this Court should grant this Petition, reverse his conviction, and grant him a new trial with directions that the confidential informant be produced.

CONCLUSION

Petitioner's case presents an opportunity for this Court to reaffirm the mandate of *Roviaro* v. *United States, supra,* to set a more fixed rule on when disclosure of a confidential informant should be ordered and consolidate and resolve conflicts regarding non-exclusive control possession cases. Further, because the decision of the Supreme Court of Kentucky is in conflict with the rationale of *Roviaro* v. *United States, supra,* and *United States* v. *Valenzuela-Bernal, supra,*

a Writ of Certiorari should be issued to review the opinion of the Supreme Court of Kentucky.

Respectfully submitted,

G. Murray Turner
Mulhall, Turner & Hoffman
440 South Seventh Street, Suite 300
Louisville, Kentucky 40203
(502) 584-6375

Counsel for Petitioner

APPENDIX

APPENDIX

APPENDIX A

Affiant has been an officer in the above agency for a period of 10 years and the information and observations contained herein were received and made in his capacity as an officer thereof.

On the 11th day of July, 1984, at approximately 11 a.m., affiant received information from a reliable confidential informant pursuant to KRS 218A260. My informant has proven his reliability in the past by supplying information that led to the arrest and conviction of at least one person and the confiscation of a large quantity of controlled substances. On the above date and time I was contacted by my informant who stated to me that within the last 48 hours he was at 4306 South Third Street, the home of Claude Hargrave and at this time and at this same address he observed a quantity of marijuana. He further stated to me that Claude Hargrave sells Dilaudid and uses and keeps cocaine at this address. My informant further stated that Claude Hargrave buys and sells stolen property and has in his possession at this address a stolen tricolored gold bracelet and a 24 carat gold antique box and other assorted stolen items including antiques and Anri figurines. My informant further stated that Claude Hargrave keeps pistols in his home and has a past record for thefts and drug charges. From my informants past experience in the drug world he recognized the above mentioned substance (controlled) to be marijuana.

The above took place in Louisville, Jefferson County, Kentucky.

Acting on the information received, affiant conducted the following independent investigation: Obtained info for a search warrant and verified through our records that Claude Hargrave has a past record consisting of thefts and drug charges. Set up surveillance but did not observe

any traffic, also I did observe a red Lincoln described to me by my informant as the auto Claude Hargrave drives bearing Ky. Lic. #KSK 686 in the rear of the above mentioned address.

Affiant has reasonable and probable cause to believe that grounds exist for the issuance of a search warrant, based on the aforementioned facts, information and circumstances and prays that a search warrant be issued, that the property be seized, or any part thereof, and brought before any court and/or retained subject to order of said court.

(s) Det. R. Wilson Det. R. Wilson LPD
Signature of Affiant

Subscribed and sworn to before me on _____
this 11 day of July, 1984 at 6:00 a.m./p.m. _____

? ? ? ? ? ? ? DMC

Judge, Court

APPENDIX B

JEFFERSON CIRCUIT COURT

FOURTH DIVISION

No. 84CR-1666

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

CLAUDE HORACE HARGRAVE - - - - *Defendant*

NOTICE — MOTION — ORDER

Filed March 26, 1985

TO: Ms. Gail Allen
Assistant Comonwealth's Attorney
514 West Liberty
Louisville, Kentucky 40202

Please take notice that the undersigned will on Monday, the 1st day of April, 1985, at the hour of 10:00 a.m., in the courtroom of the above Court, make the Motion and tender the Order set out below.

CERTIFICATE

I hereby certify that a copy of the foregoing was hand delivered on this 26th day of March, 1985, to the Attorney and address listed above.

MOTION TO PRODUCE INFORMANT
AND REQUEST FOR HEARING

Comes the Defendant, CLAUDE HORACE HARGRAVE, by Counsel, and moves the Court to enter an Order requiring

the Commonwealth to produce the confidential informant in this case for trial. In the alternative, the Defendant moves that this matter be assigned for a hearing for the presentation of evidence to show the materiality of the testimony of the confidential infromant. In support of said motion, the Defendant states as follows:

1. The confidential informant, if the information set forth in the Affidavit in Support for Search Warrant is correct, possesses material and exculpatory evidence which will help exonerate the Defendant on the charges set forth in the indictment.

2. If the confidential informant was present at 4306 South Third Street within 48 hours of July 11, 1984, at 11:00 a.m., and observed drugs or individuals, the informant would be able to verify that the Defendant, CLAUDE HORACE HARGRAVE, was not present, and identify or name the parties who were present and in possession of said drugs.

3. It is important that the Court notes that the Defendant was not present upon execution of the search warrant on July 12, 1984, or aware of the charges against him until his arrest on July 20, 1984. In support of said Defendant's motion, Affidavits as exhibits are attached hereto.

WHEREFORE, the Defendant prays that his motion herein be sustained.

Respectfully submitted,

(s) G. Murray Turner
G. Murray Turner
Attorney for Defendant
Mulhall, Turner Hoffman & Triplett
440 South Seventh Street, Suite 300
Louisville, Kentucky 40203
Phone: 584-6375

ORDER

The Defendant having so moved, and it appearing that the confidential informant herein may be is possession of material and exculpatory evidence which would be beneficial to the Defendant, or lead to the production of exculpatory evidence, and the Court being otherwise sufficiently advised;

IT IS HEREBY ORDERED that this matter be and is hereby assigned to the ____ day of _____, 1985 for a hearing to determine whether or not the testimony of the confidential informant is material or exculpatory in nature.

_____

Judge

Date: _____

APPENDIX C

TRANSCRIPT OF EVIDENCE

* * * * * * * *

The Court: Except as I understand it, Mr. Hargrave is charged simply because it is his house.

Ms. Allen: Simply because it is his house.

The Court: And he was not there at the time when the search warrant was conducted.

Ms. Allen: And he was not there. But regardless of whether Mr. Hargrave was the person that the confidential informant met in the house or whether in fact there was another person who was in the house at that time, I don't think the fact that another person was at Mr. Hargrave's house selling drugs or whatever and having those drugs would necessarily negate or exculpate Mr. Hargrave.

APPENDIX D

JEFFERSON CIRCUIT COURT

DIVISION FOUR (4)

No. 84CR 1666

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

CLAUDE HORACE HARGRAVE - - - - *Defendant*

ORDER

This case came before the court for a hearing upon the defendant's motion to require the disclosure of the confidential informant. The Commonwealth appeared by counsel; the defendant appeared in person and with counsel.

After hearing evidence presented and after hearing extensive arguments of counsel, it appears that the defendant's expectation of what the confidential informant may testify to is purely speculative. The defendant has witnesses to bolster his defense that the controlled substance did not in fact belong to him, hence denying disclosure of the confidential informant does not appear to adversely affect the defendant. Accordingly, the court is of the opinion that the protection of the public interest to be gained by not requiring disclosure of the confidential informant far outweighs the benefits, if any, to the defendant by requiring disclosure.

WHEREFORE, IT IS ORDERED that the defendant's Motion to require disclosure of the confidential informant may be and is hereby overruled.

(s) Richard A. Revell
Richard A. Revell, Judge

April 17, 1985

APPENDIX E

JEFFERSON CIRCUIT COURT

DIVISION FOUR (4)

No. 84CR 1666

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

CLAUDE HORACE HARGRAVE - - - - *Defendant*

JUDGMENT OF CONVICTION AND SENTENCING

At a Court commenced February 5, 1986 and continued on February 6 and 7, came the defendant, Claude Horace Hargrave, and his counsel, the defendant standing on his plea of not guilty heretofore entered herein. The Court being advised by both parties that they were prepared to proceed with this cause to the determination of a jury, it was ordered by the Court that such a proceeding begin.

THEREFORE, to try the issue, came a jury of peers, duly selected and sworn according to law. All of the evidence having been heard; the jury retired and after having deliberated the issues, returned into open Court and reported the following verdict, TO WIT:

"VERDICT No. 1
TRAFFICKING IN A CONTROLLED SUBSTANCE—
COCAINE"

"We, the Jury, find the defendant, Claude Horace Hargrave, guilty under Instruction No. 1, and fix his punishment at BOTH confinement in the penitentiary for Seven (7) Years, and at a fine of $10,000.

Delores Heil
Foreperson"

"VERDICT No. 3
TRAFFICKING IN A CONTROLLED SUBSTANCE—
MARIJUANA"

"We, the Jury, find the defendant, Claude Horace Hargrave, not guilty under Instruction No. 3.

Delores Heil
Foreperson"

"VERDICT No. 4
POSSESSION OF A CONTROLLED SUBSTANCE—
MARIJUANA"

"We, the Jury, find the defendant, Claude Horace Hargrave, guilty under Instruction No. 4, and fix his punishment at confinement in the County Jail for 90 Days.

Delores Heil
Foreperson"

"VERDICT No. 5
TRAFFICKING IN A CONTROLLED SUBSTANCE—
METHAQUALONE"

"We, the Jury, find the defendant, Claude Horace Hargrave, not guilty under Instruction No. 5.

Delores Heil
Foreperson"

"VERDICT No. 6
POSSESSION OF A CONTROLLED SUBSTANCE—
METHAQUALONE"

"We, the Jury, find the defendant, Claude Horace Hargrave, guilty under Instruction No. 6, and fix his punishment at a fine of $500.00.

Delores Heil
Foreperson"

"VERDICT No. 7

TRAFFICKING IN A CONTROLLED SUBSTANCE—METHAPHETAMINE"

"We, the Jury, find the defendant, Claude Horace Hargrave, not guilty under Instruction No. 7.

Delores Heil
Foreperson"

"VERDICT No. 8

POSSESSION OF A CONTROLLED SUBSTANCE—METHAPHETAMINE"

"We, the Jury, find the defendant, Claude Horace Hargrave, guilty under Instruction No. 8, and fix his punishment at confinement in the County Jail for Twelve (12) Months.

Delores Heil
Foreperson"

Pursuant to the defendant's requested a poll of the Jury was conducted. Each Juror acknowledged that the verdict was his or hers.

The defendant having been charged with being a Persistent Felony Offender in the First Degree, the Court then proceeded with the second phase of the trial. The defendant appeared in person and with counsel, the defendant then standing on his plea of not guilty. Both parties announced ready. The evidence was then heard; and instructions of the law were given by the Court to the Jury; and each party by counsel then presented closing arguments. The Jury then retired, and after having deliberated the issues, returned into open Court and reported the following verdict, To Wit:

"VERDICT No. 1
PERSISTENT FELONY OFFENDER IN THE FIRST DEGREE"

"We, the Jury, find the defendant, Claude Horace Hargrave, guilty under Instruction No. 1, and fix his punishment at confinement in the penitentiary for Twenty (20) Years.

Delores Heil
Foreperson"

The defendant then requested a poll of the Jury which was conducted by the Court. Each Juror acknowledged that the verdict was his or hers. There being no further need for the Jury, the Court dicharged and dismissed the Jury.

The defendant then waived the conduction of a Presentence Investigation, and stated there is no reason why sentencing should not be imposed at this time. The Court being of the Opinion the defendant understands his right to have a Presentence Investigation conducted, and that he knowingly, intelligently and voluntarily waived said right, the Court accepted said waiver.

WHEREFORE, IT IS ORDERED AND ADJUDGED AS FOLLOWS;

1. The Verdicts of the Jury are hereby entered and accordingly the defendant is found guilty of Traffiicking In a A Controlled Substance—Cocaine; Possession of a Controlled Substance Marijuana, Methaqualone and Methaphetamine, and being a Persistent Felony Offender in the First Degree.

2. In accordance with the Jury's Verdict, the defendant is hereby sentenced to Seven (7) Years in the penitentiary and $10,000 fine on the Charge of Trafficking In A Controlled Substance, Cocaine; 90 Days in the County Jail on the charge of Possession Of A Controlled Sub-

stance, Marijuana; A Fine of $500.00, Possession Of A Controlled Substance, Methaqualone; and Twelve (12) Months in the County Jail for Possession Of A Controlled Substance—Methaphetamine.

Said sentences to run Concurrently; further in accordance with the Jury's Verdict said Seven (7) Year sentence is enhanced to Twenty (20) Years by virtue of his conviction of being a Persistent Felony Offender in the First Degree.

It appearing the defendant is not eligible for probation, shock probation, or conditional discharge pursuant to KRS 532.080(5) inasmuch as the defendant has been found to be a Persistent Felony Offender in the First Degree, it is accordingly ordered that the Sheriff of Jefferson County, Kentucky shall deliver the defendant, Claude Horace Hargrave, into the custody of the Bureau of Corrections for the purpose of carrying out the sentence herein imposed.

3. The defendant having requested that an Appeal Bond be set, said bond to be set at $20,000 full cash.

4. In accordance with the Jury's Verdicts, the charges of Trafficking In A Controlled Substance — Marijuana, Trafficking In A Controlled Substance — Methaqualone, Trafficking In A Controlled Substance — Methaphetamine are dismissed.

(s) Richard A. Revell
Richard A. Revell, Judge

February 12, 1986

APPENDIX F

RENDERED: NOVEMBER 26, 1986
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

No. 86-SC-282-MR

CLAUDE HORACE HARGRAVE - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

OPINION OF THE COURT BY JUSTICE WHITE AFFIRMING

This appeal is taken from the Jefferson Circuit Court in which Claude Hargrave was convicted of trafficking in a controlled substance (cocaine) as well as the misdemeanors of possession if marijuana, methaqualone, and methamphetamine. After a hearing in which his status as a persistent felony offender (first degree) was established, his sentence was enhanced to twenty years.

On July 11, 1984, Detective Russell Wilson of the Louisville Police Department gave an affidavit in support of a search warrant in which he affirmed that a reliable confidential informant had told him that "within the past 48 hours he was at 4306 South Third Street, the home of Claude Hargrave, and at this time and at this same address he observed a quantity of marijuana." Based upon this, a search warrant was issued and executed.

No one was on the premises when the officers entered the residence, but a large quantity of cocaine, marijuana, methaqualone, and methamphetamine was found. Some-

what over a week later Appellant presented himself to the police and was arrested.

Prior to trial a hearing was held upon Mr. Hargrave's motion to disclose the identity of the confidential informant or to produce same for an *in camera* hearing. Following its denial a second motion was made and another hearing conducted with the same result. Appellant now argues that the lower Court erred in both instances. Two theories are argued: (1) that the confidential informant was a material witness to the accused's guilt or innocence, a standard set forth in KRS 218A.260, and (2) that there was a substantial preliminary showing that a false statement was made within the affidavit either knowingly or with reckless disregard for the truth. *Franks* v. *Delaware,* 438 U. S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978).

With regard to the former, Appellant cites us to *Roviaro v. U. S.,* 353 U. S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957), and *Burks* v. *Commonwealth,* Ky., 471 S. W. 2d 298 (1971), in which an informant had witnessed the sale of drugs. Mr. Hargrave reasons that

> If the informant must be produced if he witnesses a disputed sale for which the defendant is charged, logic demands that he be produced if he witnesses a disputed possession with intent to sell.
>
> . . . .
>
> The confidential informant actually observed the criminal act of possession and thus ceased to be merely a source of information. He became a key witness to the guilt or innocence of the accused.

Appellant argues that his defense that "he did not possess the drugs in question and was not present when the informant witnessed the possession of the drugs" establishes the materiality of the informant. We cannot agree.

"Possession" sufficient to convict under the law need not be actual; "a defendant may be shown to have had constructive possession by establishing that the contraband involved was subject to his dominion or control." *Rupard* v. *Commonwealth,* Ky., 475 S. W. 2d 473, 475 (1972). Examining the affidavit, the informant is never said to have told the detective that he witnessed Mr. Hargrave personally possessing drugs, only that he observed a large quantity of drugs at Appellant's home.

Thus, the fact that Mr. Hargrave "was not present when the informant witnessed the possession of the drugs" clearly is *im*material; possession was inferred from the drugs' being present on Appellant's premises, not by the infromant's seeing him personally handle them. Likewise, constructive possession is established, *inter alia,* through dominion and control; such is a matter herein linked primarily to the status of the house, a concern to which the informant could neither add or detract.

The informant's assertion to Detective Wilson was that he observed a quantity of drugs at a location apparently under the dominion and control of Mr. Hargrave. The fact that Appellant may or may not have been present does not bear upon the effect of this information.

On the second prong, that a false statement was included within the affidavit either knowingly or with reckless disregard for the truth, Mr. Hargrave cites us to the testimony of Susan Murphy, one of the witnesses at the first hearing. Ms. Murphy acknowledged that she was the informant; however, she denied having been inside the Hargrave home within 48 hours of the affidavit's being sworn. Putting this in the simplest terms possible, the fact that Ms. Murphy identified herself as a source of information for Detective Wilson does not establish that she was "the" source, *i.e.* the particular informant upon whom the detective relied. At the hearing Detective Wilson confirmed

that his informant had told him that he had seen drugs inside the Hargrave home within 48 hours of the time of the affidavit. The fact that Susan Murphy says *she* did not tell him that does not make it any less true.

At the conclusion of the trial on the trafficking and possession charges, the jury returned with a verdict finding Mr. Hargrave guilty both of trafficking in and possession of cocaine, this despite the instructions' being presented as trafficking *or* possession. The Circuit Court thereupon merged the lesser offense into the greater and entered judgement as to the trafficking.

Appellant now argues that such was violative of RCr 9.84 which requires that on a guilty verdict the jury fix the degree of the offense and set the penalty. Such, however, presupposes proper preservation or error. At the verdict's return the following exchange occurred:

> The Court: Well, what I said wouldn't happen, happened, and that is, they've found him guilty of Trafficking and Possession. The Possession can be merged —
>
> Mr. Deatrick [for the Commonwealth]: Yes, sir.
>
> Mr. Turner: [for the defendant]: Judge, I would think that just the opposite would be true; that if they found him guilty of the higher offense and the lower offense, that the guilty finding on the lower offense would prevail. I certainly don't see how you can say that that would merge into the higher—

Clearly such in no way approached the point now being argued, that the trial court erred to Appellant's substantial prejudice by selecting ,*sua sponte,* a verdict for the jury. *See* CR 76.12(4)(c)(iv) requiring "reference to the record showing whether the issue was properly preserved for review and, if so, in what maner."

In *Franklin* v. *Commonwealth*, Ky., 490 S. W. 2d 148, 151 (1973), under applicably similar facts it was held:

> There is no doubt about the verdict insofar as the jury finding the defendant guilty. This court has held through a long line of cases that formal defects in a verdict are waived by the accused's allowing the discharge of the jury without moving the court to recommit the jury for the correction of the verdict. [Citations omitted.] Since the verdict in this case is only defective as it relates to the punishment to be inflicted and as the right to have the jury fix the punishment in this jurisdiction is procedural, RCA 9.84, we are of the opinion that it can be waived. It is generally held that an accused in a criminal prosecution has the right to object to an insufficient verdict but failure to do so waives any defect in the verdict.

In *Franklin* the jury was instructed that it could return a sentence in the penitentiary *and/or* a fine, and its verdict was returned in the same manner: five years and/or $5,000 fine. The appellate court held that "the verdict as it was rendered by the jury [was] patently unintelligible and impossible for the trial court to interpret without speculation insofar as the degree and extent of punishment are concerned" and remanded it "to the trial court to fix punishment as if a guilty plea had been entered without regard to the verdict."

Herein there was no such patent unintelligibility. Contrary to its instructions the jury returned guilty verdicts and penalties under two counts, one of which was a lesser included offense of the others. [Defense attorney's assertion notwithstanding, *supra*, the law operates to have the greater absorb the lesser, not the other way around.] Having not been asked to resubmit the matter to the jury,

the lower Court by default assumed the sentencing authority. We can find no error in this matter preserved for our review.

Before the Persistent Felony Offender stage started, the Commonwealth successfully moved for an unsigned judgment of a previous felony conviction to be signed by the Jefferson Circuit Court *nunc pro tunc* in order to be used to establish Mr. Hargrave's PFO-1 status. Appellant argues that this was not a clerical mistake in a judgment, correctable under RCr 10.10, but rather the lack of a judgment itself into which void life could not be subsequently breathed without prejudice to him. No cases are cited in support of this position.

In response we refer Appellant *inter alia* to *Spears* v. *Commonwealth,* Ky., 462 S. W. 2d 931-932 (1971):

> Spears [in challenging his enhanced penalty] complains that the order book of the Pulaski Quarterly Court in which the July 1952 judgment was recorded was not signed until the trial for the 1970 violation. The judge of the Pulaski Quarterly Court signed the 1952 order book over the objection of Spears. Spears asserts that this constituted prejudicial error and relies upon *Blanton* v. *Castle,* Ky., 450 S. W. 2d 818 (1970). That case, however, dealt with the procedural effect of nonsignature of a quarterly court order book on the appealability of a judgment recorded therein. *Green* v. *Commonwealth,* Ky., 413 S. W. 2d 329 (1967), is dispositive of the argument of Spears in the aspect in which it is presented. In the Green case we held in a prosecution identical with the one with which we are here concerned that the question is not whether the quarterly court judgment is procedurally perfect. When the judge of the Pulaski Quarterly Court signed the order book the 1952 conviction became valid for

> all purposes and adequately evidenced the conviction of Spears for the offense recited therein. No question of the judgment's finality is presented. The prosecution proved that it had been appealed and upheld a long time before the present trial.

We can find no distinction within the present case and no cause to depart from the reasoning of *Spears*.

In November 1985 a pretrial hearing was held upon Appellant's motion to suppress certain prior convictions offered for enhancement purposes. We are now told that the lower Court erred in failing to suppress his 1977 conviction for trafficking in a controlled substance (heroin). His present allegation is two-fold: (1) that the record taken at the entry of his guilty plea is silent as to a knowing and voluntary waiver of his Constitutional rights and (2) that it does not establish a factual basis for his plea.

With reference to Point 1, Mr. Hargrave argues that although he responded in the affirmative when asked by the 1977 Circuit Judge, "Are you pleading guilty to trafficking?", he in fact though he was pleading guilty to possession. Courtroom proceedings are often "swearing matches" between witnesses, with the trier of fact left to determine credibility. Herein, in 1985 the Court was called upon to resolve the conflict within the testimony of Appellant himself. Mr. Hargrave asserted that despite that direct question and answer, he though—on some unstated basis and with reference to no source of authority whatsoever—that the indictment had been amended to possession. Indeed, according to his 1985 testimony, he went in and out of prison without having once seen and documentation indicating that he was there for trafficking. Claude Hargrave, a man who had already established a record of felony convictions, would have had the lower court believe that it was not until 1985 that he was suddenly struck with

the revelation that eight years earlier he had been sentenced and had actually served time under a charge allegedly different from that to which he had thought he had pled. According to the November 1985 transcript, on the one hand he remembers what he pled guilty to and what charge; on the other he denies realizing he had pled guilty to trafficking rather than possession.

Our attention is not, of course, on what occurred subsequently to his 1977 conviction but on what was the state of facts at the time of his guilty plea. Indeed, given the status of the record, there is no merit in continued attention at all to this aspect of the argument on appeal, for the record of the transcript from the November 1985 hearing for speaks for itself at pages 36-37:

> Mr. Turner: . . . Judge, the only issue in this [motion to suppress the 1977 conviction] is whether or not there is a factual basis established for the plea of guilty. The record reflects that the other questions relating to whether or not he understands his rights appear to be pretty clear.

(We would note that at that November 1985 hearing Mr. Hargrave also acknowledged having been aware of and advised of certain rights in 1977, *e.g.* the right to trial by jury, the right not to testify should there be a trial by jury, and the right to call witnesses on his own behalf.)

Turning to "the only issue . . . whether or not there is a factual basis established for the plea of guilty," the case to be offered against Appellant was that he had been charged with trafficking based upon possession of twenty bags of heroin. Twenty bags assuredly is a sufficient basis from which trafficking could be inferred. The factual basis was there.

At the conclusion of the Commonwealth's case during the PFO proceeding Mr. Hargrave moved for a directed verdict, asserting that the Commonwealth had failed in its burden of proving an element of the offense, to wit that the prior felony convictions were not concurrent or uninterrupted consecutive terms of imprisonment. Upon an examination of the record we must disagree.

In proving the prior felonies the Commonwealth established that Appellant had in 1967 been convicted of two burglary-related charges in Ohio for which concurrent sentences were given. It further proved that in Michigan in 1975, in the federal court system in 1976, and in Kentucky in 1977 Mr. Hargrave was convicted of crimes which were treated as concurrent and uninterrupted consecutive sentences of imprisonment for PFO purposes. Thus, to support a PFO-1 charge the Commonwealth had offered two "sets" of prior felonies from which a jury could conclude that status enhancement was appropriate.

Appellant, however, argues that inasmuch as his 1967 sentence had been for a term of from one to fifteen years, only by inference could it be drawn that such was not an uninterrupted consecutive term with that imposed in 1975, 1976, and 1977. *Hon* v. *Commonwealth,* Ky., 670 S. W. 2d 851 (1984), is cited as authority that an element for a PFO conviction shall not be established through inference.

We do not challenge *Hon;* rather we find that it has not been breached herein. When the Commonwealth established that Mr. Hargrave was convicted of larceny committed in Michigan on or about February 21, 1975, it per force established that he was not simultaneously serving a prison sentence in Ohio. This not only is a matter of common sense; it also is a matter of record evidence.

Appellant's final contention is that despite the fact that the Circuit Court had overruled his motion based upon questioning whether the Michigan term was an uninter-

rupted consecutive term with that of Ohio, the Court failed in instructing the jury on this, thereby not allowing it to have considered all of his cited convictions as only one, thus defeating a PFO-1 count. It is argued that by not doing same the Court abrogated its duty to instruct upon the whole law of the case.

Mr. Hargrave refers us to *Callison* v. *Commonwealth*, Ky. App., 706 S. W. 2d 434 (1986) [miscited throughout as 4343 Ky. 434 (1986)], in which at 436 it states: "Where there is sufficient evidence to support a reasonable inference concerning the ultimate fact in a case, the issue should be submitted to the jury with appropriate instructions [citations omitted]."

We again note the the Commonwealth established to our satisfaction, and earlier to the Circuit Court's, that for purposes of getting beyond the directed verdict stage, the Michigan and Ohio incarcerations were not an uninterrupted consecutive term. The question thereupon became whether Appellant presented *any* evidence on his own behalf which in any way would have cast doubt upon the Commonwealth's position that the terms did not run concurrently or consecutively.

We have been referred to no place in the record in which Mr. Hargrave created such a jury issue by either direct or inferential proof; consequently that fact established by the Commonwealth stood unrefuted and did not require resolution by a jury. No error is to be found in the instructions.

Accordingly, for all the aforementioned reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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APPENDIX G

SUPREME COURT OF KENTUCKY

86-SC-282-MR

CLAUDE HORACE HARGRAVE - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

ORDER DENYING PETITION FOR REHEARING

Appellant's petition for rehearing is denied.

All concur.

entered: March 12, 1987.

(s) Robert F. Stephens
Chief Justice

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

CLAUDE HORACE HARGRAVE - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

CERTIFICATE OF SERVICE

I, G. MURRAY TURNER, Counsel for Petitioner, certify that the attached Petition for Writ of Certiorari, Appendix, and Notice of Appearance was mailed to the Office of the Clerk of the United States Supreme Court, Washington, D. C. 20543, and to Counsel for Respondent, Hon. Dave Armstrong, Attorney General, Commonwealth of Kentucky, Office of the Attorney General, State Capitol Building, Frankfort, Kentucky 40601, this 18 day of May, 1987, by personally depositing same in the United States, Mail, first class postage prepaid.

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STATE OF KENTUCKY
COUNTY OF JEFFERSON } ss

Subscribed, sworn to and acknowledged before me, a Notary Public, this 18 day of May, 1987 by G. MURRAY TURNER.

My Commission expires: 10/22/89

Notary Public, State at Large, Ky.

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

CLAUDE HORACE HARGRAVE - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

NOTICE OF APPEARANCE

The Clerk will enter my appearance as Counsel for Petitioner. I certify that I am a member of the Bar of the United States Supreme Court. The Clerk is requested to notify the undersigned of action by the Court by regular mail.

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